

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 37 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HEIRS OF DECD.DAHYABHAI KHALAS-VINOD DAHYABHAI KHALAS & 1

Versus

BHOGILAL HARILAL KHALAS

Appearance:

MRS KETTY A MEHTA for Petitioners

MR MC BHATT for Respondent No.2

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 04/02/98

ORAL JUDGEMENT

Heard learned counsel for the respective parties.
Respondent No. 1 who is Vendor of the property in question and his interested having vested in Respondent No. 2 and is not affected by outcome of this appeal and is not required to be heard at this stage.

Appellants-Plaintiffs have filed a Suit for

challenging the Sale Deed executed by Respondent No. 1 in favour of Respondent No. 2 on 20-1-1994 in respect of constructed portion of the Plot on the southern side of F.P No. 169/4, situated at Ashram Road, Ahmedabad. The case of the plaintiff in brief is that the Suit-plot was actually owned by one Sonabai Bhanabhai Kilabhai, niece of Dahyabhai Harilal Khalas and Bhogilal Harilal Khalas, {predeceased of plaintiffs} who are brothers, but she purchased the same Benami in the name of Dahyabhai and Bhogilal. The said Sonabai by her Will dated 15-8-1962 had bequeathed all her properties in favour of Dahyabhai exclusively. On Sonabai's death in 1963, the property exclusively vested in Dahyabhai. In that view of the matter, Bhogilal had no interest in the property which he could transfer to respondent No. 1 and 2. Alternatively, it has also been pleaded that even otherwise property being in the joint name of Dahyabhai and Bhogilal was a joint property and Bhogilal alone had no right to transfer that property. An application for interim relief was also made for issuance of temporary injunction restraining Defendant No. 2 from further transferring, assigning and/or parting with the possession of the Suit-property or any part thereof and/or from bringing about any sort of new or further construction or from making any permanent alterations or of temporary nature in the suit property, and/or transferring FSI rights in favour of any person whomsoever until the final disposal of the suit. That application has been rejected by the order under appeal by the learned trial Judge on 26th December, 1997. In rejecting the application, the trial Judge reached a prima facie conclusion that 'the contentions raised by the plaintiff that the suit property was not partitioned cannot be prima facie accepted at this stage'. The learned Judge also relied on the circumstances that the alleged Agreement to Sale dated 19th August, 1973 is jointly signed by Dahyabhai and Bhogilal and the suit has been filed after the death of Dahyabhai; after about 1 and half years of the execution of the Sale Deed. This disentitles the plaintiffs who are heirs of Dahyabhai from getting equitable relief by way of temporary injuncntion.

It has been urged by the learned counsel for appellant that these prima facie conclusions have been reached by the learned trial Judge by misreading the evidence before it and also relying on inadmissible document which was a zerox copy only which could not be read in evidence. On the other hand, it has been urged by the learned counsel for respondent No. 2 that when prima facie Agreement to Sale was executed jointly by

Dahyabhai and Bhogilal, way back in the year 1973 and there is recital of separate ownership and of separate construction in agreement to sale, prima facie, partition is proved. It was also urged by the learned counsel for respondent that proceeding taken by Dahyabhai for propounding the Will by Sonabai did not succeeded and Will was held to be illegal and inoperative, to which the learned counsel for appeallant replies that an Appeal against that order an appeal filed in this Court, which is pending hearing and the decree passed in those proceedings have been stayed by this Court, and the matter is subjudiced.

Having carefully considered the rival contentions, the obvious facts which emerge and about which for the present purposes there is no dispute between the parties nor finding of the trial Ccourt is contrary to it that the property in question was joint as tenancy in common, leaving aside the controversy of the Will, of the defendants Bhogilal and predesessor of the plaintiff Dahyabhai. Even on the basis of document which the learned counsel for appellant has stated to be not admissible in evidence, the learned Judge has clearly reached finding, in favour of the plaintiff that per the said Deed, the suit property came to the share of the deceased Dahyabhai and Defendant No. 1 and they are the joint owners of the property. In the alleged Agreement to Sale on which signature of Dahyabhai is disputed, apart from the recital of the fact that the two constructions on separate portions have been made by respective joint owners there is a clear recitation that no deed of relinquishment from partition have been executed between the parties. Admittedly, property is not ancestral one but is claimed to have been acquired through their own labour. Having come to conclusion that the property was of the joint ownership and the plea of partition having been set up by the defendants, the approach of the learned Judge that plaintiffs' plea about want of partition cannot be accepted shows that he has examined the entire issue from wrong angle about the burden of proof, to prove the disputed facts before him. The question which the learned Judge should have addressed himself on finding the property to be joint ought to be whether defendants have produced any evidence which prima facie shows that the partition has taken place. It was for him to have established prima facie once property is held to be joint that he has exclusive right to transfer the specific part of the joint property. Apparently the approach of the learned Judge was erroneous in considering the application for interim relief.

Keeping in view the circumstances, that without prejudice to the contentions of the plaintiffs as to Will, the property is admittedly joint apart from separate possession, recited in the Agreement to Sale, there is no evidence prima facie to suggest that the property was ever partitioned in accordance with law and also keeping in view that until partition through metes and bounds is sought, everything being equal, the co-sharer or his transferee may be allowed to retain possession of that part which is in his possession, but his possession is that of co-sharer subject to adjustment at the time of partition, and that no attempt has been made by the respondent no. 2, the purchaser, for almost 21 years to enforce the agreement of 1973 allegedly signed by both the owners, inspite of the fact that rights to secure specific performance of that agreement remain unaffected irrespective of interse dispute between the two brothers, and also keeping in view that plaintiffs are claiming to be exclusive owners of the property through Will which is yet to be established, I deem it just and proper that during pendency of this dispute new equities are not allowed to be brought into existence by restraining the defendants from transferring the ownership rights of the property to the third party and encumbering it to any extent.

Accordingly, appeal is allowed. Order under appeal is set-aside. Application Exh. 5 for Temporary injunction in terms aforesaid is granted in favour of the plaintiff against the respondent No.2 to operate during the pendency of suit.

No order as to costs.

Prakash*